No. 16-1466

In The Supreme Court of the United States

MARK JANUS,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GOVERNOR TOM WOLF, STATE AND LOCAL OFFICIALS, AND LOCAL GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

SAMUEL R. BAGENSTOS
Counsel of Record
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com

DENISE J. SMYLER
General Counsel
OFFICE OF THE GOVERNOR
COMMONWEALTH OF PENNSYLVANIA
225 Main Capitol Building
Harrisburg, PA 17120
Counsel for Governor Tom Wolf

JOSHUA CIVIN
General Counsel
MONTGOMERY COUNTY PUBLIC SCHOOLS
850 Hungerford Dr., Room 156
Rockville, MD 20850
Counsel for the Montgomery County Public Schools

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
A. Overruling *Abood* Would Destabilize Existing Contractual Relationships Entered into in Reliance on that Longstanding Precedent	11
B. Overruling *Abood* Would Threaten Longstanding First Amendment Principles That Have Ensured That Government Employers Can Efficiently Run Their Operations	13
C. Overruling *Abood* Would Undermine Cooperative Arrangements, Achieved Through Collective Bargaining, That Have Brought Great Value and Efficiency to Government Employers	21
1. Agency-Fee Arrangements Allow Unions to Take a Long-Term Approach in Collective Bargaining	22
2. Agency-Fee Arrangements Give Unions the Incentive and Opportunity to Promote Effectiveness and Innovation in the Delivery of Public Services	28
3. Agency-Fee Arrangements Benefit the Public by Promoting Cooperation Between Government Employers and Their Workers	34
CONCLUSION	42

TABLE OF AUTHORITIES

Page

CASES:

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011) ..... *passim*

Brooks v. NLRB, 348 U.S. 96 (1954) 22

Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*

Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591 (2008) 10, 21

Garcetti v. Ceballos, 547 U.S. 410 (2006) ..... *passim*

Harris v. Quinn, 134 S. Ct. 2618 (2014) 16, 18

Hilton v. S. Carolina Public Railways Comm'n, 502 U.S. 197 (1991) 9, 13

Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401 (2015) 9, 20, 21

Lane v. Franks, 134 S. Ct. 2369 (2014) 13, 16

Locke v. Karass, 555 U.S. 207 (2009) 15

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 9

Payne v. Tennessee, 501 U.S. 808 (1991) 12

Rankin v. McPherson, 483 U.S. 378 (1987) 34

Waters v. Churchill, 511 U.S. 661 (1994) 10

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

First Amendment ..... *passim*

Speech Clause 13

Petition Clause 13

OTHER AUTHORITIES:

Agreement Between SEIU Local 500, CTW and Board of Education of Montgomery County for the School Years 2015-2017 art. 29 (Mar. 11, 2014), https://goo.gl/3qEeHp 40

American Federation of Teachers and National Education Association, *Peer Assistance & Peer Review* A3 (1998), https://goo.gl/djpjvj 40

Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses' Unions on Heart-Attack Mortality*, 57 Indus. & Lab. Rel. Rev. 422 (2004) 32

Allyne Beach & Linda Kaboolian, Working Better Together: A Practical Guide for Union Leaders, Elected Officials and Managers to Improve Public Services (2005) 30

Breakfast Club Action Group, *SDEA Can Do Better* (Sept. 30, 2012) 24

Collective Bargaining Agreement Between AFSCME Ohio Council 8, Local 7, and City of Toledo, 2011-2014, https://goo.gl/YPH7SH 27

TABLE OF AUTHORITIES – Continued

Page

Department of Education, *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* (May 2012), https://goo.gl/og4GNg 35

Berger DuMound, *Berea Teachers, Administrators Contracts See No Base Pay Increases*, Cleveland.com (Apr. 11, 2013), https://goo.gl/dqsNpk 25

Larry Ferlazzo, *Creating a Culture of Improvement With Peer Assistance & Review (PAR)*, Educ. Week, Feb. 1, 2013, https://goo.gl/ptEvjB 39

Marc Fisher, *A School That Works by Working Together*, Wash. Post, Jan. 8, 2009, https://goo.gl/2YScMH 37

GAO, *Federal Labor Relations: A Program in Need of Reform* (July 1991).....23

GAO, *Postal Service: Labor-Management Problems Persist on the Workroom Floor* (Sept. 1994) 23

Ryan Ghizzoni, *Economic Turbulence in the Economy Impacts District*, Inspiring Excellence, Winter 2004, at 1, https://goo.gl/xEQz3V 25

Annie Gowen, *Initiative Aims to Give Broad Acres New Direction*, Wash. Post, Aug. 30, 2001 36

Eunice Han, *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover* (Feb. 27, 2016), https://goo.gl/n18Zuy 35

TABLE OF AUTHORITIES – Continued

Page

Harvard Graduate School of Education, *A User's Guide to Peer Assistance and Review*, https://goo.gl/sqAaxg 38, 39

Health Care Cost Containment Board, https://goo.gl/1Tvw5F 26

Frederick M. Hess, The Cage-Busting Teacher (2015) 38

Erin Johannson, Improving Government Through Labor-Management Cooperation and Employee Ingenuity (2014), https://goo.gl/B9JwUd 31

Susan Moore Johnson *et al.*, *Teacher to Teacher: Realizing the Potential of Peer Assistance and Review* (May 2010), https://goo.gl/Sqh4YZ 40

Jeffrey Keefe, *Public Employee Compensation and the Efficacy of Privatization Alternatives in US State and Local Governments*, 50 Brit. J. Indus. Rel. 782 (2012) 30

King County Dept. of Natural Resources & Parks, Wastewater Treatment Div., Productivity Initiative: Internal Comprehensive Review Report (2011) 26

Martin H. Malin, *Education Reform and Labor-Management Cooperation*, 45 U. Tol. L. Rev. 527 (2014) 39

Geoff Marietta, The Unions in Montgomery County Public Schools (2011), https://goo.gl/yxZURH 39

TABLE OF AUTHORITIES – Continued

Page

Moshe Marvit & Leigh Anne Schriever, *Members-only Unions: Can They Help Revitalize Workplace Democracy?* (Oct. 1, 2015), https://goo.gl/anQMSf 23

Montgomery County Public Schools, *Teacher-Level Professional Growth System Handbook* (2015) 38

Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L. Rev. 41 (1995) 11

Saul A. Rubinstein & John E. McCarthy, *Teachers Unions and Management Partnerships: How Working Together Improves Student Achievement* (Mar. 25, 2014), https://goo.gl/3WYHkg 34

San Diego Education Association, *1,000+ March Against Education Cuts and Layoffs* (May 3, 2012), https://goo.gl/eMafsA 23

San Diego Education Association, *An Important Letter from the SDEA Board of Directors* (June 19, 2012), https://goo.gl/7NzSK7 24

Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation, Working Together for Public Service (1996), https://goo.gl/519s8K 29

Mark Simon, *Transformation at Broad Acres Elementary* (2007), https://goo.gl/jNnDwa 36, 37

Fran Spielman, *Emanuel Adjusts Garbage Grid to Save $7M Before Imposing Fee*, Chicago Sun-Times, Sept. 6, 2015, https://goo.gl/X26Wfn 31, 32

TABLE OF AUTHORITIES – Continued

Page

Time to Celebrate Big, Broad Jumps in Test Scores, Wash. Post, June 3, 2004 37

Christine Vestal, *King County's Wellness Plan Beats the Odds*, Stateline, July 22, 2014, https://goo.gl/u3HWhE.....27

WestEd, *Labor-Management Collaboration in Education: The Process, the Impact, and the Prospects for Change* (2013), https://goo.gl/C6qjxW 34

Jeffrey Zax & Casey Ichniowski, *The Effects of Public Sector Unionism on Pay, Employment, Department Budgets, and Municipal Expenditures, in* When Public Sector Workers Unionize (Richard B. Freeman & Casey Ichniowski, eds., 1988).....28

A.L. Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. L. Rev. 993 (1976) 22

INTEREST OF THE *AMICI CURIAE*[1]

Amici are Pennsylvania Governor Tom Wolf, other elected state and local officials, and local governments. Each of the *Amici*, or the government bodies to which they are elected, engages in collective bargaining with unions chosen by their workers. *Amici* represent urban centers, suburbs, and rural jurisdictions from a total of 16 states across the country.

Amici are concerned that a decision to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), will seriously harm their interests by: (1) destabilizing existing contractual relationships, leading to legal challenges and demands for renegotiation; (2) undermining the stability of this Court's public employee speech jurisprudence, and particularly those aspects of that jurisprudence that the Court has specifically crafted to protect the interest in the effective delivery of public services; and (3) undermining cooperative labor-management arrangements that have led to effective and innovative service delivery for *Amici* and other government entities. *Amici* therefore urge this Court to leave *Abood* intact.

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission. Letters from the parties providing blanket consent for the filing of Amicus briefs in this matter have been filed with the Clerk of this Court.

Amici are:

Cities and Counties:

City of Sacramento, CA
City of Santa Monica, CA
County of Santa Clara, CA
City of Hartford, CT
City and County of Honolulu, HI
Montgomery County, MD
Prince George's County, MD
City of Minneapolis, MN
City of St. Paul, MN
City of Jersey City, NJ
City of Santa Fe, NM
City of Athens, OH
City of Relpre, OH
City of Campbell, OH
City of Columbus, OH
City of Dayton, OH
Lucas County, OH
City of Pittsburgh, PA
City Council of the City of Harrisburg, PA
County of Allegheny, PA

School Districts:

Alameda Unified School District, Alameda, CA
Chula Vista Elementary School District, Chula Vista, CA
Rincon Valley Union School District, Santa Rosa, CA
San Diego Unified School District, San Diego, CA
Sweetwater Union High School District, Chula Vista, CA
Montgomery County Public Schools, Montgomery County, MD
Pine Island Public Schools, Pine Island, MN

State Officials:

Tom Wolf, Governor, Commonwealth of Pennsylvania
Joseph M. Torsella, Treasurer, Commonwealth of Pennsylvania
Eugene A. DePasquale, Auditor General, Commonwealth of Pennsylvania
Chris Tuck, Majority Leader, Alaska House of Representatives
Peter Wirth, Majority Leader, New Mexico State Senate
Bill Wielechowski, State Senator, Alaska
Michael C. D'Agostino, State Representative, State of Connecticut

Local Officials:

Jesse Arreguin, Mayor, Berkeley, CA
Ryan Coonerty, Supervisor, Santa Cruz County, CA
Robert Garcia, Mayor, Long Beach, CA
Kevin McKeown, City Councilmember, Santa Monica, CA
Pam O'Connor, City Councilmember, Santa Monica, CA
Rochelle Pardue-Okimoto, Mayor Pro Tem, El Cerrito, CA
Mary Casillas Salas, Mayor, Chula Vista, CA
Tim Sandoval, Mayor, Pomona, CA
Michael Tubbs, Mayor, Stockton, CA
Michael E. Passero, Mayor, New London, CT
Gerald Bustos, Sheriff, Rock Island County, IL
Louisa Ewert, Treasurer, Rock Island County, IL
Kelly Fisher, County Recorder, Rock Island County, IL
Deborah Frank Feinen, Mayor, Champaign, IL

Kyle Freeman, Superintendent, Washington Community High School District 308, Washington, IL
Mark Kern, Chairman, St. Clair County Board, IL
Diane Marlin, Mayor, Urbana, IL
Don Moran, Member, County Board, Will County, IL
Thomas McNamara, Mayor, Rockford, IL
Amy M. Meyer, County Recorder, Madison County, IL
April Palmer, County Auditor, Rock Island County, IL
Cindy Svanda, Circuit Clerk, Jackson County, IL
Jacqueline Traynere, Member, County Board, Will County, IL
Mark Von Nida, Circuit Clerk, Madison County, IL
Tammy R. Weickert, Clerk of Court, Rock Island County, IL
Brandon Zanotti, State's Attorney, Williamson County, IL
Kevin Kamenetz, County Executive, Baltimore County, MD
Thomas M. McGee, Mayor, Lynn, MA
Martin J. Walsh, Mayor, Boston, MA
John J. Choi, County Attorney, Ramsey County, MN
Rafael Ortega, Commissioner, Ramsey County, MN
Victoria Reinhardt, Commissioner, Ramsey County, MN
James Carley, Board Member, Keene School District, Keene, NH
Joyce Craig, Mayor, Manchester, NH
Michael Williams, Board Member, Oyster River Cooperative School District, Durham, NH
Daniel Barrone, Mayor, Town of Taos, NM
Isaac Benton, City Councilor, Albuquerque, NM

Cynthia Borrego, City Councilor, Albuquerque, NM
Pat Davis, City Councilor, Albuquerque, NM
Diane Gibson, City Councilor, Albuquerque, NM
Jerry Hogrefe, Sheriff, Taos County, NM
Timothy M. Keller, Mayor, Albuquerque, NM
Debbie O'Malley, Commissioner, Bernalillo County, NM
Klarissa J. Peña, City Councilor, Albuquerque, NM
Steven Michael Quezada, Commissioner, Bernalillo County, NM
Ken Sanchez, President, City Council, Albuquerque, NM
Maggie Hart Stebbins, Commissioner, Bernalillo County, NM
Chumi Diamond, City Council Vice President, Long Beach, NY
Anthony Eramo, City Council President, Long Beach, NY
Scott Mandel, City Councilmember, Long Beach, NY
Sam Oliverio, Supervisor, Town of Putnam, NY
Mark C. Poloncarz, County Executive, Erie County, NY
Brian Pugh, Mayor, Village of Croton, NY
Linda D. Puglisi, Supervisor, Town of Cortlandt, NY
Rich Schaffer, Supervisor, Town of Babylon, NY
Ronald P. McDougall, Mayor, Village of Gouverneur, NY
Lovely A. Warren, Mayor, Rochester, NY
Carol Contrada, Commissioner, Lucas County, OH
Pete Gerken, Commissioner, Lucas County, OH
Darren LeBrun, County Engineer, Scioto County, OH
Steve Patterson, Mayor, Athens, OH
Tina Skeldon Wozniak, Commissioner, Lucas County, OH
Kathi Cozzone, Commissioner, Chester County, PA

Kathy Dahlkemper, County Executive, Erie County, PA
Kyle W. Foust, County Council Chair, Erie County, PA
George P. Hartwick, III, Commissioner, Dauphin County, PA
Linda McClosky Houck, Council Member, Luzerne County, PA
Ted Kopas, Commissioner, Westmoreland County, PA
Kenneth M. Kraft, Council President, Northampton County, PA
Kevin Madden, Council Member, Delaware County, PA
Lamont McClure, County Executive, Northampton County, PA
Joe Schember, Mayor, Erie, PA
Alan Vandersloot, Member, Borough Council, West York, PA
Brian Zidek, Council Member, Delaware County, PA
Angela Forkum, Member, City Council, Hoquiam, WA
Steve Williams, Mayor, Huntington, WV

SUMMARY OF ARGUMENT

Overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), would threaten significant interests of *Amici* and other government employers. First, government agencies have directly relied on *Abood* in entering into collective bargaining agreements with agency fee provisions. A decision to overrule *Abood* may require the renegotiation of those agreements, threaten renewed labor strife, and divert the attention of officials from the delivery of public services to

restructuring their previously settled bargaining relationships with their employees. Such disruption is precisely what this Court's doctrine of *stare decisis* seeks to avoid.

Overruling *Abood* would have unsettling consequences for the legal regime that governs *Amici* and other government agencies as well. A decision to overrule *Abood* could throw into doubt this Court's rulings limiting the First Amendment rights of government workers to instances in which those workers speak as citizens on matters of public concern. That limitation, the Court has repeatedly explained, serves the important interest in ensuring the efficient and effective delivery of public services – an interest that is of particular salience when the government acts as employer. *Amici* and other government agencies thus are deeply concerned to preserve the stability of this Court's public-employee speech jurisprudence. To overrule *Abood*, however, the Court would have to hold that collecting money from government workers to finance the negotiation and administration of agreements involving the terms and conditions of employment violates the First Amendment. Such a holding would threaten to dissolve the important distinction between speech-as-a-citizen and speech-as-an-employee on which the Court's public-employee speech doctrine rests. *Stare decisis* is designed to prevent this sort of doctrinal unraveling.

Finally, overruling *Abood* would threaten important joint labor-management projects that have improved the effective delivery of services. Agency fees

create financial security that makes it less likely that a union's concerns for its own solvency will inhibit it from agreeing to unpopular concessions to advance the long-term interests of employees, governments, constituents, and the public good.

Without agency fee arrangements, unions have an incentive to take hard line positions and pick battles to constantly prove their mettle to their members. In these circumstances, unions face greater pressure to respond to the loudest, most strident voices within their membership, even if those voices do not represent the long-term interests of the membership, the government, or the community as a whole. *Amici* and other government agencies have benefited by having strong and stable negotiating partners who can take such a long-term approach. As a result, their governments have found it easier to respond to tight budgetary environments and implement innovative programs that benefit the taxpayers. These efforts have relied crucially on unions with the time and staffing to engage in long-term partnerships to promote innovation. They have also relied on functioning grievance-arbitration systems. These are the very capacities that agency fees make possible. If this Court were to overrule *Abood*, it would threaten the gains that *Amici* and other government agencies have made by working jointly with their unions to improve the delivery of public services.

ARGUMENT

Petitioner asks this Court to overrule *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). "Overruling precedent is never a small matter." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). Overruling *Abood* would be inconsistent with this Court's doctrine of *stare decisis*, which the Court has described as "'a foundation stone of the rule of law.'" *Id.* (quoting *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014)).

Government employers – including the *Amici* who have joined this brief – have a strong interest in the stability of current First Amendment doctrine in the public employment context. A decision to overrule *Abood* would significantly unsettle both the law and the on-the-ground arrangements that public employers and their workers have created in reliance on that law. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. S. Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991).

Amici, like hundreds if not thousands of government agencies throughout the Nation, have entered into collective bargaining agreements with agency-fee provisions. They have done so in reliance on *Abood*. These agreements, and the strong, stable bargaining representatives they have fostered, have promoted

the efficient delivery of services while avoiding needless costs to the taxpayer. They have thus served the very government interests that this Court has determined to be particularly significant in the context of public employee speech. See *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598 (2008) (" 'The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.' ") (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)).

Overruling *Abood* would pull the rug out from under these government agencies. It could undermine the stability of their operations and budgets by forcing them immediately to renegotiate collective bargaining agreements. It would unsettle key conceptual underpinnings of First Amendment doctrine that have ensured that governments can manage their operations without facing lawsuits from employees who object to being told what to say on the job. And it would put at risk the significant benefits that government employers have reaped – for their budgets and for the delivery of effective public services – by working with the stable union partners, with a long-term focus, that agency-fee arrangements make possible. This Court should thus decline Petitioner's invitation to overrule *Abood*.

A. Overruling *Abood* Would Destabilize Existing Contractual Relationships Entered into in Reliance on that Longstanding Precedent

If this Court were to declare it unconstitutional to collect agency fees from employees who are not union members, *Amici* would be forced to stop collecting those fees immediately. But *refusing* to collect agency fees may itself violate the collective bargaining agreements *Amici* signed in reliance on *Abood*. *Amici* thus would be forced immediately to confront the question whether those agreements remained valid and binding in the absence of their agency-fee provisions. Answering that question would likely be complex. It would involve interpretation of severability clauses that appear in the agreements themselves, as well as of background state-law principles of severability in contract law. Because most unions would likely take the position that they made significant concessions to obtain the agency-fee provisions, *Amici* would confront significant uncertainty regarding whether their collective bargaining agreements would stand following a decision overruling *Abood*. See Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 Ga. L. Rev. 41, 43-44 (1995) (describing complexity of the severability inquiry under contract law).

A decision to overrule *Abood* thus could force *Amici* and other government agencies immediately to renegotiate their collective bargaining agreements. The ensuing discussions would likely be complicated and contentious, as unions sought to renegotiate long-settled terms in light of the new economic reality.

Those negotiations would create the opportunity for renewed labor tensions, strike threats, and work stoppages that would disrupt government's mission of providing needed services to the public.

As we show below, the absence of agency fees will force unions to focus on demonstrating short-term gains for the workers to retain their allegiance; the result will be to amplify the loudest, most disputatious voices at the bargaining table. See pp. 22-23, *infra*. *Amici* may thus be unable to conclude new collective bargaining agreements should this Court overrule *Abood*. And even if they could ultimately reach agreement, the renegotiation process would divert their attention from other pressing business.

These unsettling and costly consequences highlight the reliance that *Amici* and other government agencies have placed on *Abood*. This Court has long affirmed that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). The strong reliance interests that *Amici* have in the stability of *Abood*, reflected in entrenched contractual relationships, provide ample reason to adhere to that longstanding precedent.

B. Overruling *Abood* Would Threaten Longstanding First Amendment Principles That Have Ensured That Government Employers Can Efficiently Run Their Operations

Overruling *Abood* would have unsettling effects that extend well beyond collective bargaining. To overrule *Abood*, the Court will have to conclude that charging agency fees as permitted by that case impinges on the protected speech of government employees. But any such conclusion would "throw into doubt previous decisions from this Court" outside of the union context, a fact that counsels in favor of adhering to precedent. *Hilton*, 502 U.S. at 203.

In its public-employee speech cases, this Court has consistently distinguished between speech by government workers in their capacities as *citizens* and speech by those workers in their capacities as *employees*. In *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011), the Court reaffirmed its longstanding view that "[w]hen a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern," and it held that the same speech-as-a-citizen test applies to the Petition Clause, see *id.* at 397-399. And in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." See also *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014) (explaining that "*Garcetti* distinguished between employee speech and

citizen speech" and that it is "speech as a citizen" that "may trigger protection").

The constitutional distinction between speech-as-a-citizen and speech-as-an-employee serves important interests of government employers. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

If every statement government workers made – or grievance they filed – regarding the terms and conditions of employment constituted protected speech, managerial discretion would disappear. The Court explained this point in the context of the First Amendment's Petition Clause in *Duryea*, but the analysis applies just as well to the Speech Clause:

> Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. See Brief for National School Boards Association as *Amicus Curiae* 5. Every government action in response could present a potential federal constitutional issue.

Borough of Duryea, 564 U.S. at 390-391. The result would be to "raise serious federalism and separation-of-powers concerns," as well as "consume the time and

attention of public officials, burden the exercise of legitimate authority, and blur the lines of accountability between officials and the public." *Id.* at 391. By "'constitutionaliz[ing] the employee grievance,'" *Garcetti*, 547 U.S. at 420 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)), a rule eroding the distinction between speech-as-a-citizen and speech-as-an-employee would disregard the careful compromises and accommodations to government interests reflected in the many statutory enactments protecting public workers. See *Borough of Duryea*, 564 U.S. at 392.

This Court's public-employee speech jurisprudence aims specifically to protect the managerial prerogatives of government entities like *Amici*. Needless to say, *Amici* thus have a strong interest in the stability of that jurisprudence. *Abood*, and the many cases implementing it, are built on the same distinction between speech-as-a-citizen and speech-as-an-employee that undergirds cases like *Garcetti* and *Borough of Duryea*. *Abood* allowed the union to use agency fees to finance activities such as "collective-bargaining, contract administration, and grievance-adjustment," *Abood*, 431 U.S. at 232 – matters that involve direct dealings between the government and its workers as employees, not citizens. But it did not allow the union to use agency fees "to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative," *id.* at 234 – quintessential acts of speech-as-a-citizen. See also *Locke v. Karass*, 555 U.S. 207, 210 (2009) (allowing the collection of agency fees to finance activities that are

"appropriately related to collective bargaining rather than political activities").

In a footnote in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court questioned the degree to which *Abood* tracked the broader jurisprudence of public employee speech. The Court said that it did "not doubt that a single public employee's pay is usually not a matter of public concern. But when the issue is pay for an entire collective-bargaining unit involving millions of dollars," the Court observed, "that matter affects statewide budgeting decisions." *Harris*, 134 S. Ct. at 2642 n.28. See also Pet. Br. 12-15. That may be true, but it is hardly enough to transform the activities financed by agency fees into speech-as-a-citizen under this Court's existing First Amendment cases.

Even if "comment[ary]" to "the public at large" about state budget matters would constitute speech-as-a-citizen on a matter of public concern, cf. *Lane*, 134 S. Ct. at 2380 (internal quotation marks omitted), raising these issues directly with the employer through collective bargaining, contract administration, and grievance adjustment does not. Public employee speech made through an internal grievance or bargaining process does not become speech-as-a-citizen simply because, it "could, in different circumstances, have been the topic of a communication to the public that might be of general interest." *Connick*, 461 U.S. at 148 n.8. See *Borough of Duryea*, 564 U.S. at 398 (public employee speech and petitioning is not protected unless it "seek[s] to communicate to the public or to advance a political or social point of view beyond the employment

context"). See also *Connick*, 461 U.S. at 147 (protection of public-employee speech depends not just on its "content" but on its "form" and "context").

Moreover, the contractual requirement to pay an agency fee does not in any way stem from fee-payers' out-of-work life as citizens. That obligation owes its entire existence to their status as employees. That fact in itself suffices, under the Court's public-employee speech precedent, to show that the agency fee does not violate the First Amendment. See *Garcetti*, 547 U.S. at 421-422 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."). To the extent that payment of an agency fee is speech, therefore, it is speech-as-an-employee – even if an out-of-work public statement about the matters *financed* by agency fees might be speech-as-a-citizen.

In any event, agency fees finance a number of activities that necessarily relate to work-focused matters that center on particular employees. The most notable example is grievance adjustment. This Court's agency-fee decisions have long treated employee grievances as a paradigm case in which nonmembers can be required to pay their fair share of union expenses. See *Abood*, 431 U.S. at 232. Correlatively, this Court's public-employee speech cases have long treated those grievances as a paradigm case involving conduct that does *not* receive protection as speech by a citizen on a matter of public concern, see *Borough of Duryea*, 564 U.S. at 390-391; *Garcetti*, 547 U.S. at 420; *Connick*, 461 U.S.

at 154. See also *Borough of Duryea*, 564 U.S. at 408 (Scalia, J., concurring in the judgment in part and dissenting in part) ("A union grievance is the epitome of a petition addressed to the government in its capacity as the petitioner's employer."). Highlighting the conflict between their position and this entrenched precedent, Petitioner specifically argues that internal grievances by public employees *do* receive First Amendment protection. Pet. Br. 14-15.

Even if it were limited to collective bargaining, the distinction hinted at in the *Harris* footnote would not provide public employers with the certainty they need in going about their daily affairs. This Court has held that matters involving disputes between government employees and their employers over garden-variety workplace questions do not constitute speech-as-a-citizen even if they "are related to an agency's efficient performance of its duties." *Connick*, 461 U.S. at 148. And the *Harris* footnote seemed to agree – at least if a sufficiently small number of employees were involved. See *Harris*, 134 S. Ct. at 2642 n.28 (taking as given "that a single public employee's pay is usually not a matter of public concern"). But there is no principled way to determine how many employees must be involved before their grievances become constitutionally protected: Ten? A hundred? A thousand? Twenty thousand? Cf. *Harris*, 134 S. Ct. at 2646 (Kagan, J., dissenting) (noting that the "total workforce" at issue in that case "exceed[ed] 20,000"). This uncertainty will inhibit public employers from taking the vigorous and decisive action that is often necessary in the efficient

management of an enterprise's day-to-day affairs. Uncertainty of this sort breeds constitutional litigation, which "itself may interfere unreasonably with both the managerial function (the ability of the employer to control the way in which an employee performs his basic job) and with the use of other grievance-resolution mechanisms, such as arbitration, civil service review boards, and whistle-blower remedies, for which employees and employers may have bargained or which legislatures may have enacted." *Garcetti*, 547 U.S. at 449.

But there is more. Even when a public employee speaks as a citizen on a matter of public concern, this Court's cases allow the government employer to restrict that speech to serve "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. *Abood* itself noted that public employers agree to agency-fee arrangements precisely to serve their important managerial interests. See *Abood*, 431 U.S. at 224. And as the balance of this brief demonstrates, see Section C, *infra*, *Amici* have found that agency-fee arrangements play a crucial role in facilitating the effective and efficient delivery of public services. If this Court were to overrule *Abood*, it would have to disregard those key interests and thus undermine the established principle that the government's managerial interests must be weighed in the balance when public employers restrict the speech of their workers.

Abood thus "is not the kind of doctrinal dinosaur or legal last-man-standing for which [this Court]

sometimes depart[s] from *stare decisis*." *Kimble*, 135 S. Ct. at 2411. "To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others." *Id.* If this Court were to overrule *Abood*, one would be hard-pressed to explain why public employees are *not* protected by the First Amendment when they engage in activities related to bargaining and contract administration, such as filing garden-variety grievances against their employers. However, as *Borough of Duryea* explained, such grievances are paradigmatic examples of speech-as-an-employee, which this Court's cases have refused to protect lest government agencies be hamstrung in their efforts to deliver services efficiently. See *Borough of Duryea*, 564 U.S. at 390-392. See also *id.* at 407 (Scalia, J., concurring in the judgment in part and dissenting in part) ("When an employee files a petition with the government in its capacity as his employer, he is not acting 'as [a] citize[n] for First Amendment purposes,' because 'there is no relevant analogue to [petitions] by citizens who are not government employees.'") (quoting *Garcetti*, 547 U.S. at 423-424). Notably, neither the Petitioner nor the Solicitor General so much as cite this Court's decision in *Borough of Duryea*.

If this Court were to hold that public employees have a First Amendment interest in avoiding being charged for the administration of such grievances – which it would have to do to overrule *Abood* – that holding would threaten to unravel the key conceptual underpinning of the public employee speech doctrine.

That would place *Amici* at risk of uncertain liabilities and undermine the important governmental interests in the efficient delivery of public services that *Borough of Duryea*, *Garcetti*, and *Connick* were specifically crafted to protect. Given these risks, the Court certainly should not "unsettle stable law." *Kimble*, 135 S. Ct. at 2411.

C. Overruling *Abood* Would Undermine Cooperative Arrangements, Achieved Through Collective Bargaining, That Have Brought Great Value and Efficiency to Government Employers

In addition to unsettling the *legal* obligations of government employers under existing collective bargaining agreements and this Court's First Amendment law, a decision to overrule *Abood* would undermine many valuable instances of effective, cooperative collective bargaining. These instances of labor-management cooperation have served the interest in efficient delivery of public services that this Court has recognized as an important counterweight to employee speech interests. See *Engquist*, 553 U.S. at 598; *Connick*, 461 U.S. at 150. And they would not have happened without the strong and stable unions, who can take a long-term approach in collective bargaining, that agency fees make possible.

1. Agency-Fee Arrangements Allow Unions to Take a Long-Term Approach in Collective Bargaining

In negotiating collective bargaining agreements, unions often face difficult choices between the short- and long-term goals of their members and other employees. When budgets are tight, governments may ask unions to sacrifice important short-term interests without any clear offsetting benefit other than preserving the ability to provide necessary services. Agency-fee arrangements make collective bargaining more effective by giving unions the stability to make difficult agreements that may be unpopular but are in the long-term interests of employees and the entire community.

Disallowing agency-fee arrangements vastly increases the leverage of dissident factions over the *entire* bargaining unit's behavior. Rather than organizing for the next election, these factions can now threaten an immediate loss of funds by discontinuing their membership. Cf. *Brooks v. NLRB*, 348 U.S. 96, 100 (1954) (a union's bargaining rights are insulated from a competing union's challenge for one year so that the union is not "under exigent pressure to produce hothouse results or be turned out"). Such membership instability discourages unions from agreeing to hard choices and instead creates an incentive to take hardline positions, press borderline grievances, and even demonize government leadership to "demonstrate that they can 'get something' for their members." A.L. Zwerdling, *The Liberation of Public Employees: Union*

Security in the Public Sector, 17 B.C. L. Rev. 993, 1012 (1976) (internal quotation marks omitted).

For example, the regime governing federal employee labor relations – which does not allow agency fees – has bred an adversarial and litigious environment in which unions have the incentive to "concentrate on the problems raised by 'malcontents.'" See GAO, *Federal Labor Relations: A Program in Need of Reform* 33 (July 1991). See also GAO, *Postal Service: Labor-Management Problems Persist on the Workroom Floor* (Sept. 1994). The same dynamic can be seen in states where agency fees are banned. *E.g.*, Moshe Marvit & Leigh Anne Schriever, *Members-only Unions: Can They Help Revitalize Workplace Democracy?* (Oct. 1, 2015) (members-only unions – "located [predominately where] legal conditions . . . such as right-to-work laws make it difficult to organize a majority union" – have adversarial relationships with employers), https://goo.gl/anQMSf.

In contrast, unions with agency fee arrangements can work with government employers to reach necessary but hard agreements – even in the face of vocal opposition within the bargaining unit.

Recent events in San Diego Unified School District (SDUSD) – one of the *Amici* – provide an example. In March 2012, to deal with the ongoing impact from the recession, the SDUSD School Board took a painful but unanimous vote to lay off 1,656 teachers. The move prompted an outcry from some local school employees. See San Diego Education Association, *1,000+ March*

Against Education Cuts and Layoffs (May 3, 2012), https://goo.gl/eMafsA. Local union leaders kept talking to the district, challenging its proposed budget while explaining the severity of the problem to school employees. The union leaders' efforts to cooperate faced bitter resistance from vocal dissenting factions. SDUSD and the union, however, had an agency-fee arrangement in place.

Ultimately, the union agreed to various concessions, including furlough days and deferred raises, in exchange for reduced layoffs and other measures. San Diego Education Association, *An Important Letter from the SDEA Board of Directors* (June 19, 2012), https://goo.gl/7NzSK7. Although the deal was ratified, one-third of union members voted to reject it. That fall, union leaders faced an unsuccessful recall petition charging that they had replaced "strong union organizing targeting the District" with "'collaboration.'" Breakfast Club Action Group, *SDEA Can Do Better* (Sept. 30, 2012).

As this example illustrates, under an agency fee arrangement, dissenting employees have the freedom to speak out. If they convince a majority of their peers, they can reject an agreement, replace leadership, or decertify the union. But they cannot threaten immediate withdrawal of financial support and hold hostage union decision-making when the need for quick and decisive action on hard choices is paramount – and when a majority of the bargaining unit supports the union's position and the union's position is in the best interest of the community and a majority of employees.

Given time, agency fee arrangements create a foundation of stability that can lead to trusting relationships to help manage even the most difficult circumstances. For example, in suburban Cleveland, the Berea City School District faced an unprecedented budget shortfall during the recession. Ryan Ghizzoni, *Economic Turbulence in the Economy Impacts District*, Inspiring Excellence, Winter 2004, at 1, https://goo.gl/xEQz3V. To stabilize the budget, the district – which has long had an agency-fee arrangement with its teacher and administrator unions – was forced to close and consolidate schools and substantially reduce staff. *Id.* The unions worked closely with management to determine how best to place staff into the consolidated buildings. School district and union leaders attributed the successful negotiation to the parties' open, trusting relationship and cooperative, non-adversarial approach to bargaining. Berger DuMound, *Berea Teachers, Administrators Contracts See No Base Pay Increases*, Cleveland.com (Apr. 11, 2013), https://goo.gl/dqsNpk.

Even absent acute budgetary crises, the long-term approach engendered by agency-fee arrangements has enabled government employers to incentivize their unions to help improve service delivery and, in many cases, reduce costs. For example, Lucas County, Ohio – one of the *Amici* – formed a labor-management committee in the 1980s to address health care costs. The committee has succeeded in developing a health insurance package that employees support and that has saved the county money. The committee regularly

reviews health insurance programs and products, and it interviews providers to ensure that county employees receive high-quality health care at a low cost to the taxpayers. See Health Care Cost Containment Board, https://goo.gl/1Tvw5F.

The municipal government of King County, Washington, has similarly relied on the unions that represent its employees in a number of initiatives that improved service delivery while reducing costs. From 2001 through 2011, the County's Wastewater Treatment Division engaged in a collaborative Productivity Initiative with its unions. That initiative resulted in "savings of almost $73 million," while the Division "took on a significant amount of new work and new facilities without increasing staff." King County Dept. of Natural Resources & Parks, Wastewater Treatment Div., Productivity Initiative: Internal Comprehensive Review Report v (2011). One of the terms of the Initiative provided that cost savings would be shared by the ratepayers (in the form of lower rate increases) and the workers (in the form of bonuses and additional training programs). See *id.* at vii. The close involvement of municipal unions in drafting and implementing these terms provided a crucial incentive and mechanism for workers to provide ideas that would promote the efficient delivery of public services.

Unions also worked jointly with King County to develop the municipality's groundbreaking "Healthy Incentives" program. During its first five years, that program "invested $15 million and saved $46 million in health care spending with sustained participation

by more than 90 percent of [the County's] employees." Christine Vestal, *King County's Wellness Plan Beats the Odds*, Stateline, July 22, 2014, https://goo.gl/u3HWhE. In 2012, as a result of the program, "$61 million in surplus health care funds were returned to county coffers because cost growth was lower than actuaries had projected." *Id.*

And in Toledo, Ohio, the union that represents the city's employees developed a program in which union members serve as peer trainers to promote the use of safe work practices. Under that program, which the city has now specifically embraced in its collective bargaining agreement, employee injuries have decreased, with the result that the city has saved money previously lost to workers' compensation payouts and lost work time. See generally Collective Bargaining Agreement Between AFSCME Ohio Council 8, Local 7, and City of Toledo, 2011-2014 at § 2117.87, https://goo.gl/YPH7SH (including this safety training program). Without the resources to develop and implement this program, the union could not have provided this service to the city.

These successes would not have been possible without the security afforded to unions by agency-fee arrangements. Overruling *Abood* would deprive government employers of strong and stable negotiating partners who can take the long view during difficult budget times. It would thus substantially undermine "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150.

2. Agency-Fee Arrangements Give Unions the Incentive and Opportunity to Promote Effectiveness and Innovation in the Delivery of Public Services

As researchers have long noted, public employers frequently draw on the expertise of unions who identify inefficiencies in government operations, point those inefficiencies out to their employers, and thereby save taxpayer money. In 1988, Professors Jeffrey Zax and Casey Ichniowski highlighted examples of municipal unions using their superior knowledge of employee turnover to recommend the elimination of unnecessary budget lines for new hires. See Jeffrey Zax & Casey Ichniowski, *The Effects of Public Sector Unionism on Pay, Employment, Department Budgets, and Municipal Expenditures*, *in* When Public Sector Workers Unionize 323, 326 (Richard B. Freeman & Casey Ichniowski, eds., 1988). Only a union with the resources to analyze trends in staffing patterns – and the strength to ensure that its workers would reap some benefit from the savings – would have the capacity and incentive to bring such inefficiencies to an employer's attention. Zax and Ichniowski concluded that "[p]ublic unions may succeed in their objectives, in part, because organized public sector employees are better prepared than other citizens are to assess service needs and to ensure effective service provision." *Id.* at 356-357.

In 1996, a task force chaired by former New Jersey Governor James J. Florio and then-Louisville Mayor Jerry Abramson identified numerous cases in which public employers were able to incentivize their

unions to generate innovations that improved service delivery within existing "financial resource constraints," and that "in many cases also led to cost savings and stable tax rates." Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation, Working Together for Public Service (1996), https://goo.gl/519s8K. The task force found "increases of 30 percent to 50 percent in productivity and decreases of 25 percent in time-loss expense, such as workers' compensation, overtime and absenteeism" to be "not uncommon" in these efforts. *Id.* Among the examples described by the task force included the following (*id.*):

- The unions representing workers for Peoria, Illinois, helped to propose changes in the city's employee health care plan; those changes saved the city over $1 million in health care costs the next year.

- The union representing building inspectors in Madison, Wisconsin, developed a training program for electricians who work in the city. The program improved relationships between city inspectors and private building contractors and, by promoting better practices among electricians, reduced the number of necessary inspections by 25 percent.

- The union representing sanitation workers in Los Angeles, California, identified a need for closer cooperation between drivers and mechanics to increase the availability of sanitation trucks. With the union's input, the city implemented changes that substantially

increased the availability of those trucks, and thus cut in half the city's need to pay overtime to sanitation workers.

- The union representing transit workers in King County, Washington, saved hundreds of thousands of dollars by identifying work that the municipality had been contracting out but that could be performed more cheaply in house.

The report listed many similar examples from around the Nation. See *id.*

Shortly after publication of the task force report, Louisville's water authority entered into a contract with its union to create "a new labor-management team to oversee the implementation of [a] joint strategic plan and partnership agreement." Allyne Beach & Linda Kaboolian, Working Better Together: A Practical Guide for Union Leaders, Elected Officials and Managers to Improve Public Services 28 (2005). The team saved the water authority millions of dollars by avoiding unnecessary contracting out. See *id.* A number of recent studies have found that such "contracting back-in" often represents the most efficient means of delivering public services – and that it frequently results from "internal process improvements undertaken by labor management cooperation." Jeffrey Keefe, *Public Employee Compensation and the Efficacy of Privatization Alternatives in US State and Local Governments*, 50 Brit. J. Indus. Rel. 782, 794 (2012).

Government employers have continued to receive important assistance from their unions in avoiding unnecessary costs. As a recent report details, the union representing operating engineers in a Minnesota municipality recommended that all bargaining-unit engineers be moved into the same job classification. "Once these changes were agreed upon through bargaining, employees were all given raises and were cross-trained to perform all of the types of work needed." Erin Johannson, Improving Government Through Labor-Management Cooperation and Employee Ingenuity 5 (2014), https://goo.gl/B9JwUd. The change increased managerial flexibility, which "enabled the work to go more smoothly, as managers didn't have to ensure that every classification of operator was present on the site in order to get the job done." *Id.* Along the same lines, the City and County of Honolulu (one of the *Amici*) and one of its unions agreed to create a "multi-skilled" worker class in which employees were trained to do multiple blue-collar tasks. These workers received an increase in pay for assuming new duties, but Honolulu ultimately saved money by reducing overtime costs and the need to hire additional staff who performed only one type of skill.

In 2015, the union that represents Chicago's garbage collectors identified changes to garbage truck routes that will save the city $7 million, which can now be used for other pressing public needs. See Fran Spielman, *Emanuel Adjusts Garbage Grid to Save $7M Before Imposing Fee*, Chicago Sun-Times, Sept. 6, 2015 ("In partnership with Laborers Union Local 1001, the

city has identified adjustments to grid boundaries that will allow the city to reduce the daily deployment of garbage trucks from 310 to 292. The savings generated will free up resources for other vital services like tree-trimming and rodent control, the mayor's office said."), https://goo.gl/X26Wfn.

Efforts like these depend on unions having sufficient resources to identify and pursue possible efficiencies in the delivery of public services. Rank-and-file workers often can make important contributions to improving service delivery, given their front-line experiences. But without strong and stable organizations that can collect the information and direct it to managers who will take action to improve service delivery and allow workers to share in their benefits, government employers may never learn about existing inefficiencies.

Functioning grievance-arbitration systems, which result from collective-bargaining relationships and are financed by agency fees, are also crucial to ensure that employees who have concerns about the inefficiencies in current operations can raise those concerns with the knowledge that they will be protected against retaliation by managers who may be offended. Cf. Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses' Unions on Heart-Attack Mortality*, 57 Indus. & Lab. Rel. Rev. 422, 425 (2004) (arguing that union grievance procedures, by providing "protection from arbitrary dismissal or punishment," may "encourage nurses to speak up in ways that improve patient outcomes but

might be considered insubordinate and, hence, career-jeopardizing without union protections").

Indeed, the presence of a strong and stable union negotiating partner can enable government entities to improve the grievance process itself. In the Commonwealth of Pennsylvania, whose governor and other high officials are *Amici*, the government and the union negotiated an "Accelerated Grievance Process" (AGP) that helped to clear an enormous backlog of pending grievances. As a result of this process – which the Commonwealth and the union have continued to improve over the years – the vast majority of grievances are heard and resolved much more quickly. The result is to make clear to employees that they can safely come forward with workplace concerns while protecting the public fisc against the large back pay awards that can accumulate during backlogged grievance proceedings.

But if this Court overrules *Abood* and bans agency-fee arrangements, the resource base available to unions to perform the arbitration task will erode. And unions will be forced to devote additional time and resources to giving short-term benefits to their members to obtain their allegiance, rather than seeking efficiencies that may pay off for the workers only in the longer term. Government employers – and their citizens who depend on the efficient delivery of services – thus have a strong stake in the continuing vitality of *Abood*.

3. Agency-Fee Arrangements Benefit the Public by Promoting Cooperation Between Government Employers and Their Workers

Agency-fee arrangements also foster trusting, close relationships in the workplace. This Court has repeatedly recognized that developing such relationships is an important interest for a government employer. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) ("[P]ertinent considerations" for First Amendment balancing include "harmony among coworkers" and "close working relationships for which personal loyalty and confidence are necessary."); *Borough of Duryea*, 564 U.S. at 389-390 (recognizing a "substantial government interest[]" in avoiding "a serious and detrimental effect on morale"); *Connick*, 461 U.S. at 151 ("'[I]t is important to the efficient and successful operation of [government] for [employees] to maintain close working relationships with their superiors.'"). *Amici* have relied on these relationships to provide important benefits to the public.

These relationships are particularly important in the context of public education. Studies consistently show that strong union-administration relationships improve educational outcomes for students.[2] The U.S.

---

[2] *E.g.*, Saul A. Rubinstein & John E. McCarthy, *Teachers Unions and Management Partnerships: How Working Together Improves Student Achievement* 2 (Mar. 25, 2014) (finding that "[f]ormal partnerships help improve student performance" and "[p]artnerships lead to more extensive communication between teachers"), https://goo.gl/3WYHkg; WestEd, *Labor-Management Collaboration in Education: The Process, the Impact, and the Prospects for Change* 1 (2013), https://goo.gl/C6qjxW ("A key

Department of Education has asserted its "working hypothesis" that "collaboration is a more effective and efficient way to develop great teachers and strong instructional systems, and that it is a more sustainable approach over time than the ups and downs of adversarial relationships." Department of Education, *Shared Responsibility: A U.S. Department of Education White Paper on Labor-Management Collaboration* 23 (May 2012), https://goo.gl/og4GNg. Agency-fee arrangements make those partnerships much more likely to develop. This may, in part, explain why districts in states allowing or requiring agency-fee arrangements have lower teacher quit rates, higher quality teachers, and lower student dropout rates. Eunice Han, *The Myth of Unions' Overprotection of Bad Teachers: Evidence from the District-Teacher Matched Panel Data on Teacher Turnover* 35, 39, 42 (Feb. 27, 2016), https://goo.gl/n18Zuy.

In many school districts, the ability to innovate and experiment to improve their performance turns in large measure on their ability to work collaboratively with their employees. One example of this dynamic can be seen in the turnaround at Broad Acres Elementary School in Montgomery County, Maryland – where the school district and its unions have long shared an agency-fee arrangement. Broad Acres, whose student body was the poorest in the district and included many

---

finding . . . is that collaborative partnerships often build trust and strengthen professional relationships among local leaders. The partnerships have been crucial for districts attempting to implement innovative practices that improve teaching and learning.").

recent immigrants, had been the lowest-performing elementary school in the district. See generally Mark Simon, *Transformation at Broad Acres Elementary* (2007) ("*Broad Acres Case Study*"), https://goo.gl/jNnDwa. Faced with Broad Acres' chronic underperformance, the superintendent of Montgomery County Public Schools determined that it might be necessary to "re-constitute" the school by removing the principal and bringing in new staff – a disruptive and expensive process. *Id.* at 5. But after working with the district's three labor associations, which represent teachers, administrators, and support staff, the superintendent agreed to an alternative strategy: reinvesting in employees who signed on to a sweeping plan to improve the school. *Id.* at 6.

Through their unions and in exchange for a pay increase and extended planning time, employees at Broad Acres agreed to receive more training, work more hours each week, work during the summer, and commit to stay at the school for at least three years – reducing chronically high teacher turnover. *Id.* at 6; see also Annie Gowen, *Initiative Aims to Give Broad Acres New Direction*, Wash. Post, Aug. 30, 2001, at T16. Employees also agreed to play an active part in planning, analyzing, and leading efforts to improve student achievement. *Broad Acres Case Study* 6-7.

This ambitious plan would have been unthinkable without employee support, which required rebuilding trust after the threat of re-constitution. *Broad Acres Case Study* 8. The unions, as trusted advocates for the employees, engaged teachers at the school in designing

the new turnaround plan. *Id.* at 8-9. A third of the teachers decided to leave the school and take preferential transfer status, but a full two-thirds decided to stay and commit to the turnaround plan. *Id.* at 9.

The collaborative plan worked. Administrators and employees developed innovative approaches tailored to the special challenges of the low-income, immigrant-heavy student body. *Broad Acres Case Study* 9. Within a few years, the collaborative effort raised testing proficiency rates by up to 50 percentage points. *Time to Celebrate Big, Broad Jumps in Test Scores*, Wash. Post, June 3, 2004, at T6; see also Marc Fisher, *A School That Works by Working Together*, Wash. Post, Jan. 8, 2009, https://goo.gl/2YScMH. *Amici* – which include the school district that negotiated these arrangements – firmly believe that agency fees helped create the conditions that enabled this turnaround.

Agency fees have also reinforced broader innovations by promoting long-term planning, non-adversarial mindsets, experimentation, and effective communication. In many school districts, unions have worked with administrators to develop and carry out policies that fundamentally reimagine the role of unions, teachers, and other district personnel in school administration. In particular, unions and the employees they represent have taken on non-traditional roles – such as participating in teacher evaluations or discussions about using and preparing for standardized testing – that improve student experiences and outcomes.

For example, a number of districts have implemented "Peer Assistance and Review" (PAR) programs. These programs, which are jointly administered by the local teachers' and principals' unions, evaluate and mentor new and struggling teachers. See generally Harvard Graduate School of Education, *A User's Guide to Peer Assistance and Review*, https://goo.gl/sqAaxg. They emerge from shared labor and management interests in improving the quality of instruction for students and creating an evaluation system that is less adversarial but effective in mentoring struggling teachers and transitioning those who persistently underperform.

In a typical PAR program, teams of "consulting teachers" – expert teachers chosen through a competitive process – are responsible for coaching and evaluating new and struggling teachers. *A User's Guide to Peer Assistance and Review* 5. During the course of a school year, these consulting teachers monitor their assigned teachers' performance; provide coaching, support, real-time feedback, and hands-on guidance; and ultimately present their recommendations to a panel of administrators and teachers about whether their teachers should be dismissed, re-hired, or provided another year of PAR support. *Id.* at 5-6; see also Montgomery County Public Schools, *Teacher-Level Professional Growth System Handbook* 9-17 (2015); Frederick M. Hess, The Cage-Busting Teacher 152-153 (2015).

PAR programs have many positive effects. They have helped contribute to "significant increases in

student achievement and a substantial narrowing of the achievement gap." Geoff Marietta, The Unions in Montgomery County Public Schools 1 (2011), https://goo.gl/yxZURH; see also Martin H. Malin, *Education Reform and Labor-Management Cooperation*, 45 U. Tol. L. Rev. 527, 531 (2014) (peer review helps explain the academic success of Toledo City District, which has typical urban demographics "but sustains top scores on state performance indices for grades 3-6, has the highest graduation rate and second highest attendance rate among large urban districts in Ohio, and boasts [a high school] ranked in the top 10% of high schools by *U.S. News & World Report*"). PAR programs also save money by reducing turnover and the costs of dismissing teachers. See *A User's Guide to Peer Assistance and Review* 11 (replacing novice teacher costs $10,000 to $20,000); Larry Ferlazzo, *Creating a Culture of Improvement With Peer Assistance & Review (PAR)*, Educ. Week, Feb. 1, 2013 (five-year retention rate of 65% in PAR-adopting Montgomery County, compared to 50% nationally), https://goo.gl/ptEvjB.

Moreover, PAR programs address multiple concerns of labor and management. They ensure that underperforming teachers get the support they need. They alleviate the burden on principals to singlehandedly administer evaluation programs and instructional support to struggling teachers. And they also allow schools to identify effective teachers and dismiss

ineffective teachers more efficiently without a prolonged adversarial process.[3]

Because school employees recognize that PAR programs are joint labor-management enterprises, they are more likely to readily support these changes and actively participate in the programs. Agency-fee arrangements support the cooperative, stable relationships necessary to establish a PAR program, and help obtain the enthusiastic employee buy-in critical to those programs' success. Indeed, successful PAR programs are predominantly located in school districts that have adopted agency-fee arrangements. See, *e.g.*, Susan Moore Johnson *et al.*, *Teacher to Teacher: Realizing the Potential of Peer Assistance and Review* 25 (May 2010), https://goo.gl/Sqh4YZ; American Federation of Teachers and National Education Association, *Peer Assistance & Peer Review* A3, B1-B9 (1998), https://goo.gl/djpjvj.

An example of long-term, innovative cooperation at the state level is the Pennsylvania Employees Benefit Trust Fund (PEBTF). In 1988, the Commonwealth

---

[3] Montgomery County has further adapted the PAR model for support staff, establishing a "Supporting Services Professional Growth System" for evaluating, developing, and recognizing employees, replacing the ordinary arbitration process. Agreement Between SEIU Local 500, CTW and Board of Education of Montgomery County for the School Years 2015-2017 art. 29 (Mar. 11, 2014), https://goo.gl/3qEeHp. Although the program substantially raises performance expectations for participating employees, the robust professional development and support system helps employees meet those high standards, to the mutual benefit of staff and the school district.

of Pennsylvania and unions representing state government workers established the PEBTF to administer health benefits to help control costs. The PEBTF is governed by a Board of Trustees made up of equal numbers of management and union representatives. The Commonwealth and unions negotiate the annual funding the PEBTF receives; within this defined revenue amount, the Trustees then determine the level of benefits to be provided to employees. The PEBTF has controlled costs through aggressive negotiations with vendors, while implementing innovative wellness programs and other initiatives.

In sum, agency-fee arrangements are a critical component of contemporary public-sector management. Governments and unions have learned that providing high-quality services to their constituents often requires significant commitments from unions and their members. And agency-fee arrangements allow the fidelity, flexibility, and resources that make those commitments possible. Unions that can take the long view recognize that providing effective public services is essential to preserving public support for public services, and to protecting the long-term interests of their members. Were this Court to overrule *Abood*, and bar public-employee unions from collecting agency fees, government employers would lose important opportunities for collaboration. The significant public benefits from these collaborations provide another significant reason for the Court to adhere to its precedent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
625 S. State St.
Ann Arbor, MI 48109
734-647-7584
sbagen@gmail.com

DENISE J. SMYLER
General Counsel
OFFICE OF THE GOVERNOR
COMMONWEALTH OF PENNSYLVANIA
225 Main Capitol Building
Harrisburg, PA 17120
Counsel for Governor Tom Wolf

JOSHUA CIVIN
General Counsel
MONTGOMERY COUNTY PUBLIC SCHOOLS
850 Hungerford Dr., Room 156
Rockville, MD 20850
Counsel for the Montgomery County Public Schools

MATTHEW RUYAK
Interim City Attorney
915 I St., Fourth Floor
Sacramento, CA 95814
Counsel for the City of Sacramento

JAMES R. WILLIAMS
County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 West Hedding St., East Wing, Ninth Floor
San José, CA 95110-1770
Counsel for Amicus County of Santa Clara

ANDRA M. DONOVAN
General Counsel
SAN DIEGO UNIFIED SCHOOL DISTRICT
4100 Normal St.
San Diego, CA 92103
Counsel for San Diego Unified School District

JEREMY FARRELL
Corporation Counsel
CITY OF JERSEY CITY
280 Grove St.
Jersey City, NJ 07302
Counsel for the City of Jersey City

ZACH KLEIN
City Attorney
CITY OF COLUMBUS, DEPARTMENT OF LAW
77 N. Front St., 4th Floor
Columbus, OH 43215
Counsel for the City of Columbus